

Department of Legislative Services
Maryland General Assembly
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FISCAL AND POLICY NOTE

Senate Bill 660

(Senator McFadden)

Judicial Proceedings

Lead-Based Paint Damages - Reimbursement by Manufacturer - Market Share Liability

This bill requires a manufacturer of lead-based paint to reimburse a person for “damages” resulting from the presence of lead-based paint in a residential, public, or commercial building. For purposes of the bill, damages includes personal injury damages and expenses incurred to abate lead-based paint.

A manufacturer of lead-based paint may be held liable under any legally recognized theory of liability, including a market share theory of liability pursuant to which a person is not required to demonstrate that an individual manufacturer manufactured the lead-based paint that caused the damage. If a manufacturer is found to be liable under a market share theory, the manufacturer’s liability shall be the percentage of the total damages that equals the manufacturer’s share of the market at the time the manufacturer sold lead-based paint in the market.

Fiscal Summary

State Effect: Increase in revenues to the extent that the State would be able to recover lead-based paint damages from manufacturers that it would not otherwise be able to recover. Possible increase in expenditures by the Judiciary to account for additional cases brought against manufacturers of lead-based paint.

Local Effect: Increase in local revenues to the extent that local governments would be able to recover lead-based paint damages from manufacturers that it would not otherwise be able to recover.

Small Business Effect: Potential meaningful. Small businesses might be able to recover lead-based paint damages from manufacturers that they would not otherwise be able to recover.

Analysis

Current Law: Statute defines “lead-based paint” as paint or other surface coatings that contain lead in excess of the maximum lead content level allowed by the Maryland Department of the Environment (MDE) by regulation. MDE regulations define a “lead-containing substance” as any paint, plaster, or other surface encapsulation material containing more than 0.50% lead by weight calculated as lead metal in the dried solid, or more than 0.7 milligram per square centimeter.

Chapter 114 of 1994 established the Lead Poisoning Prevention Program in MDE. The program implements the 1994 “Reduction in Lead Risk in Housing Law” and provides limited liability relief for owners of rental property built before 1950 and others in exchange for the reduction of lead hazards in these older rental properties. The program also provides for limited compensation to children who are poisoned by lead.

By December 31, 1995, the owner of an affected property must have registered that property with MDE. An owner who first acquires affected property after that date must register the property within 30 days of acquisition. At each change in occupancy, before the next tenant occupies the property, an owner must satisfy the risk reduction standard by passing the test for lead contaminated dust or performing specified lead hazard reduction treatments. An affected property is exempt from the risk reduction standards under specified conditions.

Maryland courts have generally rejected “market share liability” that would allow a plaintiff to recover based on a defendant’s market share within an industry where that particular defendant’s involvement in the plaintiff’s injury is uncertain. *See, e.g., Owens-Illinois, Inc. v. Zenobia*, 325 Md. 665 (1992).

Background: In 1978, lead-based paint was banned nationwide for consumer use by the federal government. According to guidelines set by the Centers for Disease Control and Prevention, the maximum recommended blood lead level for a child is 10 micrograms per deciliter of blood. Lead poisoning impacts the cognitive and physical development of young children. Children are exposed to lead through breathing lead paint dust, eating lead paint chips, or absorbing lead while in-utero. Most exposures can be eliminated by removing lead paint from the homes of children and pregnant women. Although the number of cases of childhood lead poisoning in Maryland has decreased significantly

over the past decade (from 1,830 in 1996 to 260 in 2002, the most recent date for which data was readily available), lead paint remains a significant health issue.

According to MDE, approximately 28,000 property owners have registered their properties with MDE under the Reduction of Lead Risk in Housing Program. There are approximately 135,000 pre-1950 rental units; of these, 30,000 have been certified lead-free. Accordingly, about 105,000 units are subject to the risk reduction requirements.

The most common cause of childhood lead poisoning is dust from lead paint in homes. According to the Baltimore City Health Department, legal enforcement efforts were responsible for the abatement of 587 homes in the city between 2001 and 2005.

Market share liability has its origins in the California case *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588 (1980). In *Sindell*, the California Supreme Court devised market share liability to allow victims of the defective miscarriage preventative diethylstilbestrol (DES) to recover for their injuries in case where plaintiffs could not determine which manufacturer of DES was responsible for their injuries. The court reasoned that “between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury.” Market share liability has been applied in only a handful of cases nationwide outside of the DES context. In one such case in 2005, the Wisconsin Supreme Court extended Wisconsin’s variant of market share liability to litigation against lead-based paint manufacturers. *Thomas v. Mallett*, 701 N.W.2d 523 (Wis. 2005).

Additional Information

Prior Introductions: HB 1394 of 2006, an identical bill, received an unfavorable report by the House Judiciary Committee.

Cross File: HB 746 (Delegate Carter, *et al.*) – Judiciary.

Information Source(s): Judiciary (Administrative Office of the Courts); Maryland Department of the Environment; Department of Housing and Community Development; Baltimore City; Donald Gifford & Paolo Pasicolan, *Market Share Liability Beyond DES Cases: The Solution to the Causation Dilemma in Lead Paint Litigation?*, 58 S.C.L. Rev. 115; Department of Legislative Services

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